No. 44382-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent

v.

DEVON MARTEEN DANIELS,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court denied Mr. Daniels a fair trial by improperly granting a challenge for cause following a rehabilitation of depriving him of a jury that was indifferently chosen, and without an opportunity to be heard.

2. The trial court committed prejudicial error when it improperly admitted Mr. Daniels's booking photograph into evidence.

3. Insufficient evidence was presented to establish beyond a reasonable doubt that Mr. Daniels was guilty of burglary in the second-degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Persons summoned for jury service may only be excused by the court pursuant to Title 4.44 RCW, or "upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary." RCW 2.36.100. Must the conviction be reversed and dismissed where the trial court failed to follow this procedure or to state a valid basis for removing a qualified juror?

2. The admission of a booking photograph can be improper if it raises a prejudicial inference of criminal propensity. Is the admission

of Mr. Daniels's booking photograph improper and must the conviction be reversed if it raises a prejudicial inference because identity of the party arrested was not at issue?

3. A criminal defendant's constitutional right to due process is violated when a conviction is based upon insufficient evidence. In this case the State failed to present sufficient evidence that Mr. Daniels unlawfully entered or remained in the Forge Jack Pot's office. Was Mr. Daniels's right to due process violated when he was convicted of one count of burglary in the second-degree?

C. STATEMENT OF THE CASE

According to Maria Espinosa, a long-time clerk at the Forge Jack Pot convenience store, owned by Mark Freisem, Mr. Daniels came into the store on June 11, 2012 to get a cup of coffee. Mr. Daniels was unable to pay for the coffee and so Ms. Espinosa told him to go ahead and just take it without paying. 1RP 133-35. Mr. Daniels left the building and came back a few minutes later and asked Ms. Espinosa if he could use the restroom and she gave Mr. Daniels permission to do so. *Id.* at 37; 136. Mark Freisem was in the Forge when Mr. Daniels came back in and saw Ms. Espinosa give Mr. Daniels permission to use the restroom. He took the coffee cup in with him. It was later

recovered on the desk in the office. 1RP 54. The restroom was not a public bathroom but Mr. Freisem and his employees did allow customers to use it. *Id.* at 37

Mr. Freisem asked Ms. Espinosa if the door to the office was locked. 1RP 54. The restroom was accessible within the store. The office was then entered through a door from the restroom marked "No Exit." There was a storage space that was accessible from the office. *Id.* at 137. Ms. Espinosa had been in and out of the storage area that morning. *Id.* at 38; 136. Ms. Espinosa's testimony was conflicting regarding the office door. She stated that the door to the office from the restroom was usually closed and always locked, but also said that she was not sure if she had closed the door to the office when she last left it that morning. Ms. Espinosa testified that another client had used the restroom earlier that morning. *Id.* at 141-42. She was unclear as to whether or not the door was indeed closed when Mr. Daniels used the restroom. *Id.* at 139-43. Mr. Freisem may have told the 911 operator that the door was open. *Id.* at 104.

The door to the office could easily be opened even if locked, as the lock was faulty and often broken. A little jiggle of the handle and use of a shoulder and the door easily opened. 1RP 102-03, 137. The

door has had to be repaired multiple times in the ten years Mr. Freisem has owned the store. 1RP 106. Mr. Freisem thought the amount of time Mr. Daniels spent in the restroom was cause for concern and went to investigate after he left the store. It only took Mr. Freisem a moment to see that the office door was open and that a desk drawer that had contained a bank bag with a deposit of $7,712.59 was gone. 1RP 57. Mr. Freisem ran out of the office and yelled at Mr. Daniels to stop; he did not stop. Mr. Freisem followed him on foot but lost him. *Id.* at 78-79. He testified that Mr. Daniels was wearing a dark jacket, dark pants and a white shirt. *Id.* at 97-98.

The police were called and Mr. Freisem admittedly lied to the 911 operator by exaggerating the incident to get a quicker response. 1RP 107. The police arrived and joined Mr. Freisem's search. . Mr. Daniels was later found by Mr. Freisem and some of his friends. *Id.* at 82-84. Mr. Freisem pulled out his personal handgun while yelling at Mr. Daniels to get on the ground. The police showed up ten minutes later and arrested Mr. Daniels. *Id.* at 84-85.

The money was found, but not in Mr. Daniels's possession. 1RP 166; 2RP 235. There was a phone charger found with the money. 2RP 248. Mr. Daniels's fingerprints were not found in office, in the

restroom, on the bank bag, on the phone charger or on the coffee cup. They were not found on anything associated with the crime. 2RP 253. There was a surveillance video admitted at trial that showed Mr. Daniels doing something with the front of his pants in the office. It did not show the bank bag. 1RP 192.

During voir dire juror number 18 stated that because of experiences she had growing up and living in Detroit she did not feel that she could believe anything that cops say. Jury Voir Dire (JVD) 97.[1] The State expressed concern over the juror's ability to be fair and impartial. *Id.* Juror number 18 was questioned further and expressed that she could indeed be fair and impartial. *Id.* at 103. She said that if she were the defendant she would want herself on the jury. *Id.* at 105. Over Mr. Daniels's objection the trial court granted the State's motion to dismiss for cause stating that Juror number 18 had "an all or nothing" attitude regarding the police. *Id.* at 109.

During trial a booking photograph of Mr. Daniels was admitted over his objection. 2RP 218; 223-26. Mr. Daniels argued that the photograph was unfairly prejudicial and irrelevant. The State failed to raise the issue of identity in the opening argument and although the

[1] Not all transcripts are labeled by volume so some are listed by name or date.

issue of the actual perpetrator of the crime was at issue, the fact that Mr. Daniels was indeed arrested and booked was not. *Id.* at 219-20. Mr. Daniels argued a general denial of the crime at the trial level. *Id.* The State argued that the booking photo should be admitted because it demonstrated that Mr. Daniels had "corn rolls" at trial and did not at the time of booking. 2RP 218. The trial judge allowed the photo based on "[t]he fact that he has corn rolls today and Geri curl or something the next day isn't going to make that much difference, I assure you, to the jury. You have two African-Americans and one Native American who deal with hair issues all the time." *Id.* at 220.

D. ARGUMENT

1. Mr. Daniels was denied his right to a trial by an impartial and indifferently chosen jury, requiring reversal.

The accused in a criminal trial has a constitutional right to have a fair and impartial jury determine his guilt or innocence. U.S. Const. amends 6, 14; Wash. Const. art. 1, 3 § 22; *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987), *cert. denied*, 486 U.S. 1061 (1988); *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d 29 (1995). "Washington, like every other state, is committed to the proposition

that the right to a trial by jury includes the right to an unbiased and unprejudiced jury, and that a trial by jury, one or more of whose members is biased or prejudiced, is not a constitutional trial." *State v. Parnell*, 77 Wn.2d 503, 507, 463 P.2d 134 (1969).

a. A juror may only be removed for cause in very limited circumstances. Where a jurors's views would "prevent or substantially impair the performance of his duties" that juror must be excused for cause. *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)). If a biased juror is permitted to deliberate, the accused is denied his constitutional right to trial by an impartial jury, requiring reversal. *Parnell*, 77 Wn.2d at 507; *State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002).

Those summoned for jury service may only be excused by the court pursuant to Title 4.44 RCW, or "upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary." RCW 2.36.100. Jurors may be removed for cause if they possess a state of mind "which satisfies the court the potential juror [?] cannot try the issue impartially and without prejudice." RCW

4.44.170; RCW 4.44.190. When a challenge for actual bias is made, the trial court must determine whether the prospective juror's state of mind is such that he or she can try the case fairly and impartially. RCW 4.44.190. This is a preliminary question that must be resolved by the court before the challenge itself may be ruled upon. *Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn. App. 747, 753, 812 P.2d 133 (1991). When a challenge for cause is made, opposing counsel can object either on the grounds that it is facially insufficient or that the facts needed to support it are not true. RCW 4.44.230-250.

b. There was insufficient showing of cause to excuse the potential juror.

In this case juror number 18 voiced some concern during voir dire as to the honesty of police officers. JVD 97. Due to her experiences living in Detroit she had difficulty trusting law enforcement. When questioned further she said "I could be fair and impartial because if they have to prove something against someone they have to 100 percent in their proof in order to have these allegations against someone." *Id.* at 105.. This was a sufficient rehabilitation and the State's motion to dismiss for cause should not have been granted.

c. A defendant has a right to a trial by a jury that is representative of the community. Under *Batson v. Kentucky*, a criminal defendant is entitled to a jury comprised of members who are selected pursuant to nondiscriminatory criteria. 476 U.S. 79, 85-86, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).[2] The selection process itself functions as an irreplaceable method of protecting the impartiality of the petit jury.[3]

"The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." *Batson*, 476 U.S. at 86 (*citing Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968)); *see Taylor v. Louisiana*, 419 U.S. at 530.

In addition, the right to a trial by a jury that is representative of the community includes the right to a venire that is "indifferently chosen." *Batson*, 476 U.S. at 86-87 (*citing Strauder v. West Virginia*, 100 U.S. 303, 309, 25 L.Ed. 664 (1880)); *State v. Hilliard*, 89 Wn.2d 430, 440, 573 P.2d 22 (1977) (*citing Taylor v. Louisiana*, 419 U.S. at 522).

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[2] Even though this right does not extend to the right to a petit jury comprised of one's own race, the right to a fair and indifferent selection process is key to the *Batson* holding. 476 U.S. at 85-86.

[3] For example, the criminal rules permit both parties to exercise peremptory challenges against potential jurors without stating a reason. CrR challenges to exclude otherwise qualify and unbiased jurors based upon their race. U.S. Const. amend. 14; *Batson*, 476 U.S. at 98, *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

The central purpose of *Batson* and its progeny is to enforce the court's duty to protect the right of defendants to an impartial jury, as well as to protect the rights of potential jurors to participate in the civic process. *Batson*, 476 U.S. at 87-88. It is also to ensure that our justice system is free from any taint of unfair bias, and to ensure that all "qualified citizens" under RCW 2.36.080(1) are guaranteed the opportunity to be considered for jury service.

The removal of Juror #18 tainted the jury selection process, depriving Mr. Daniels of a jury that was "indifferently chosen." Juror number 18 was properly rehabilitated when she stated that she could be fair and impartial while serving on the jury. JVD 104. By granting the State's motion to dismiss Juror number 18 for cause, with insufficient showing of cause the trial court erred and tainted voir dire.

d. Reversal is the appropriate remedy. A harmless error analysis is not permitted in *Batson* cases, as erroneous denial of an impartial fact-finder is *per se* reversible error. *Gray v. Mississippi*, 481 U.S. 648, 668, 107 S.Ct. 2045, 95 L.Ed.2d 622, (1987) (among those constitutional rights so basic "that their infraction can never be treated as harmless error" is defendant's "right to an impartial adjudicator, be it

judge or jury.") Mr. Daniels's case must therefore be reversed and remanded for a new trial. *Gray*, 481 U.S. at 668.

2. The trial court's admission of Mr. Daniels's booking photo was prejudicial error.

a. The admission of Mr. Daniels's booking photo improperly implied he was guilty. It has been recognized by this Court that referencing a booking photo may raise a prejudicial inference of criminal propensity. *State v. Henderson*, 100 Wn. App. 794, 803, 998 P.2d 907 (2000). The wrongful admission of a booking photo is grounds for reversal if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn. App 591, 599, 637 P.2d 961 (1981).

This Court also ruled that unless identity is a material issue a booking photograph is unnecessary. *State v. Sanford*, 128 Wash. App 280, 115 P.3d 368 (2005) and *State v. Mendoza*, 139 Wash. App. 693, 162 P.3d 439 (2007). In this case the State introduced the booking photo from Mr. Daniels's arrest for the offense to which he was standing trial. 2RP 223-26. Although the identity of the person responsible for committing the crime was at issue, the fact that Mr. Daniels was arrested for that crime was not, making it analogous to the situation in *Sanford*. *Id.* at 220.

b. The admission of Mr. Daniels's booking photo was prejudicial error. The introduction of Mr. Daniels's booking photo was not harmless error. "[I]mproper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *State v. Bourgeois*, 133 Wash. App. 389, 403, 945 P.2d 1120 (1997). Almost the entirety of the evidence against Mr. Daniels introduced at trial was circumstantial so the erroneous admission of the booking photo cannot be viewed as harmless error.

c. The remedy is reversal of the conviction.

Because the introduction of the booking photo rose to the level of prejudicial error and it cannot be assumed that without the improperly admitted booking photo there was overwhelming evidence to convict Mr. Daniels, his conviction must be reversed. 128 Wash. App. at 288.

3. Mr. Daniel's right to due process was violated when the State presented insufficient evidence to establish all the elements for one conviction of burglary in the second-degree.

a. A conviction must be supported by sufficient evidence to establish beyond a reasonable doubt every essential element of the crime charged.

The State bears the burden of presenting sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S. Const. Amend. XIV; Const. art. I § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). Evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S. Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1970).

b. Insufficient evidence was presented to establish beyond a reasonable doubt that Mr. Daniels entered or remained unlawfully in the store's office to sustain a conviction of burglary in the second-degree.

Mr. Daniels was convicted of one count of burglary in the second degree. 12/19/12RP 4. RCW 9A.52.030(1):

> A person is guilty of burglary in the second degree, if with intent to commit a crime against a person or property therein, he or she *enters or remains unlawfully* in a building other than a vehicle or a dwelling.

"Enters or remains unlawfully" is defined in RCW 9A.52.010 as: "A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain."

In this case Mr. Daniels was given permission to enter the Forge Jack Pot's restroom that was adjacent to the office. There was testimony that the office door was open. 1RP 104; 139-43. Even if it had not been open there was no sign, such as one that read "Private" indicating that it was off-limits to customers. The sign on the door read "No Exit." *Id.* at 137. . There was insufficient evidence to prove that Mr. Daniels entered the office unlawfully.

c. The proper remedy is reversal of the convictions based on insufficient evidence.

A conviction based on insufficient evidence must be reversed and the charge dismissed. *State v. Kilburn*, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004). To retry Mr. Daniels for the same conduct would violate the federal and state constitutional prohibitions against double jeopardy. U.S. Const. amend. V; Wash Const. art 1 § 9; *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1979); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). In the absence of sufficient evidence to establish beyond a reasonable doubt Mr. Daniels entered or remained unlawfully in the Forge Jack Pot office his conviction for second-degree burglary must be reversed and the charge dismissed.

E. CONCLUSION

For the foregoing reasons, Mr. Daniels respectfully requests this Court order his burglary conviction be reversed based on insufficient evidence and in the alternative it be remanded to the court below.

DATED this 31st day of December 2013.

Respectfully submitted,

Maureen M. Cyr (28724) per

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 44382-1-II
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	)	
DEVON DANIELS,	)	
	)	
Appellant.	)	

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